



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 22, 2004

Mr. S. Cass Weiland
Patton Boggs LLP
2001 Ross Avenue, Suite 3000
Dallas, Texas 75201

OR2004-10810

Dear Mr. Weiland:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 215827.

Kaufman County (the "county"), which you represent, received a request for information relating to the settlement and resolution of a lawsuit against the county. You claim that the requested information "is considered confidential and should not be disclosed." We have considered your arguments and have reviewed the information you submitted.

Initially, we must address the county's obligations under section 552.301 of the Act. This section prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(b) requires the governmental body to ask for the attorney general's decision and state the exceptions to disclosure that it claims not later than the tenth business day after the date of its receipt of the written request for information. *See* Gov't Code § 552.301(b). Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). If a governmental body does not request an attorney general decision as prescribed by section 552.301, the information requested in writing is presumed to be subject to required public disclosure and must be released, unless there is a compelling reason to withhold the information. *See id.* § 552.302.

In this instance, the county has failed to claim any exceptions to public disclosure in requesting this decision, as required by section 552.301(b). Furthermore, you indicate that the county has not submitted attorney-client correspondence that is responsive to this request for information, as required by section 552.301(e)(1)(D).¹ Thus, the county has not fully complied with section 552.301. The requested information is therefore presumed to be public and must be released, unless there is a compelling reason to withhold any of the information. See Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App. — Austin 1990, no writ). The presumption that information is public under section 552.302 can generally be overcome by a demonstration that the information is confidential by law or that third-party interests are at stake. See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).

We understand you to contend that the responsive attorney-client correspondence is protected by the attorney-client privilege. Although section 552.107(1) of the Government Code encompasses the attorney-client privilege, section 552.107(1) is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. See Gov't Code § 552.007; Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, the county's assertion of the attorney-client privilege is not a compelling reason for non-disclosure under section 552.302. In failing to comply with section 552.301 in requesting this decision, the county has waived the protection of the attorney-client privilege under section 552.107(1). See Open Records Decision No. 663 at 5 (1999) (failure to comply with Gov't Code § 552.301 in requesting attorney general decision resulted in waiver of discretionary exceptions). Therefore, the county may not withhold any responsive attorney-client correspondence under section 552.107(1), and that information must be released to the requestor in its entirety.

Next, we address the public availability of the submitted settlement agreement. With respect to that information, you state that "[t]he amounts to be paid contained in the document entitled [sic] 'Settlement Agreement' were approved by the County Commissioners in Executive Session[,] and we are advised that the public session merely approved the payment of monies 'pursuant to the Settlement Agreement.'" We first note that a settlement agreement to which a governmental body is a party is specifically made public and must be

¹You state that responsive attorney-client correspondence is "not enclosed due to privilege." We note, however, that section 552.3035 expressly prohibits this office from disclosing information that is the subject of a request for an attorney general decision under the Act. See Gov't Code § 552.3035 (attorney general may not disclose to requestor or public information submitted under Gov't Code § 552.301(e)(1)(D)). Accordingly, this office routinely receives and reviews information that governmental bodies seek to withhold under the attorney-client and other privileges. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) (addressing applicability of TEX.R.EVID. 503 and TEX.R.CIV.P. 192.5 to information encompassed by Gov't Code § 552.022); Open Records Decision Nos. 676 (2002) (addressing requirements for claiming and demonstrating applicability of attorney-client privilege under Gov't Code § 552.107(1)), 677 (2002) (addressing requirements for claiming and demonstrating applicability of attorney work product privilege under Gov't Code § 552.111).

released under section 552.022 of the Act, unless the agreement contains information that is expressly confidential under other law. *See* Gov't Code § 552.022(a)(18).

Section 552.101 of the Act excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."² Gov't Code § 552.101. This exception encompasses information that is made confidential under other statutes. Under section 551.104 of the Open Meetings Act, chapter 551 of the Government Code, a certified agenda or tape recording of a lawfully closed meeting is confidential and open to public inspection and copying only under a court order issued under section 551.104. *See id.* § 551.104(c); Open Records Decision No. 495 at 4 (1988). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public.

Nevertheless, the proceedings of a governmental body in a closed meeting are not absolutely confidential. *See* Open Records Decision Nos. 605 at 2-3 (1992) (mere fact that information was discussed in executive session does not make information confidential under statutory predecessor to Act), 485 at 9-10 (1987) (investigative report not excepted from disclosure under statutory predecessor to Gov't Code § 552.101 simply by virtue of its having been considered in executive session); *see also* Attorney General Opinion JM-1071 at 3 (1989) (statutory predecessor to Gov't Code § 551.146 did not prohibit members of governmental body or other individuals in attendance at executive session from making public statements about subject matter of executive session). Thus, the fact that the county commissioners approved the settlement agreement in executive session does not make the agreement confidential under section 552.101 of the Act in conjunction with sections 551.104 and 551.146 of the Open Meetings Act. We therefore conclude that you have not shown that any information contained in the settlement agreement is expressly confidential under other law for purposes of section 552.022(a)(18). As you claim no other exception to the disclosure of the settlement agreement, and none of the information contained in the agreement otherwise appears to be confidential by law, the county must also release the settlement agreement to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

²Unlike other exceptions to disclosure, this office will raise section 552.101 on behalf of a governmental body, because the Act prescribes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

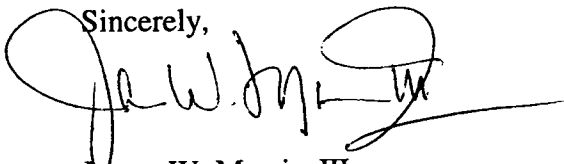
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III", with a long horizontal flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/krl

Ref: ID# 215827

Enc: Submitted documents

c: Mr. Dennis Eichelbaum
Schwartz & Eichelbaum, P.C.
7400 Gaylord Parkway, Suite 200
Frisco, Texas 75034
(w/o enclosures)